SHORT NOTES OF CASES; BEING A SELECTION OF RECENT ADJUDGED POINTS.

GROVES *vs.* WRIGHT. 2 Kay & Johns. 347.

Legacy for Life—Farming Stock—Profits Distinguishable—A farmer gave his residuary real estate, and *his farming stock and implements of husbandry*, and residuary personal estate, to trustees, upon trust to permit his wife to have the full use, benefit, and enjoyment of the same during her life, and after her decease to sell the same, and divide the produce among his children. The widow, after the testator's death, carried on the testator's farm, and took additional land, to farm on lease, in the name of her son. It was held by Sir W. Page Wood, V. C., that the lease of the additional land, and the stock thereon, belonged to the widow's estate, and the stock on the original farm to the estate of her husband. "I cannot," said his Honor, "think that the doctrine relating to things *quæ ipso usu consumuntur*, can have any application to gift of farming stock. That doctrine applies to a personal use exhausting the subject of the gift. I must regard the intention of the testator. He says nothing, it is true, about carrying on the business; but what could the widow have done with the property so given to her? Could she have sold it? It might have been sold with her consent; but in that case, surely, the income only of the proceeds must have been paid to the widow for life. That is, perhaps, begging the question of the application of the doctrine as to things *quæ ipso usu consumuntur;* but no case has been cited in which the whole of the testator's farming stock having been the subject of the gift, that doctrine has been held to apply. When all the wine in a house is given to one for life, of course the legatee for life may drink it. And there was a case in which carriage-horses were held to come within the same rule; but there the tenant for life had actually used them. Here the farming stock is given for the benefit of the testator's widow for life. She could not personally use it so as to consume it; the only use she could so personally make of it would be to sell it. By such a bequest, the testator must, I think, have intended that his widow should have the use of the stock, contemplating that she would carry on the business of the farm with it. She might have allowed the stock to be sold, and have taken the income of the produce for life, leaving the capital to the legatees in remainder, or if not, I must suppose that the testator contemplated that she would carry on the business; and if, in the course of such business, it was necessary that any part of the farming stock should be sold, then the substituted stock would follow the course of the original subject of the bequest.

FORSHAW *vs.* HIGGINSON. 20 Beav. 485.

Trustee—When and upon what Terms he can Retire from the Trust—In this case the Master of the Rolls has laid down some very useful rules upon a subject very bare of authority; *viz.* how far a trustee is justified in retiring from acting in the trusts.

"A trustee," said his Honor, "cannot from mere caprice retire from the performance of his trust, without paying the costs occasioned by that act. Any circumstances, however, arising in the administration of the trust, which have altered the nature of his duties, justify him in leaving it, and entitle him to receive his costs; but to justify him in that course, the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually."

A trustee desirous of retiring from the trust, on the ground of want of confidence in his co-trustee, cannot properly get rid of the trust by procuring the co-trustee, in whom he felt no confidence, to appoint in his place another person, not only not sanctioned, but opposed and objected to by the *cestui que trust*; "for although," said his Honor, "I do not say he would have been liable for any misconduct that might afterwards have been committed by the trustees, yet the court would certainly have greatly disapproved of such a proceeding, and he would have rendered himself liable to great risks, such as no trustee should be called upon to incur."

In *Forshaw* vs. *Higginson*, a trustee, for reasons of a private nature not arising out of the trusts, not feeling confidence in his co-trustee, was desirous of retiring from the trusts. The *cestui que trust* refused to give him a release. It was held by Sir J. Romilly, M. R., that he was justified in instituting a suit asking to be discharged from the trusts, and offering to account, inasmuch, as although he was desirous of retiring, from private circumstances, he would not have been justified in simply retiring and getting his co-trustee, in whom he had no confidence, to appoint a new trustee. The trustee was also allowed his costs. His Honor, however, said, as in this case the desire of the trustee to retire arose out of private circumstances, and not out of the administration of the trust, that if on the application of the trustee to be discharged, his *cestui que trust* had said, you must pay the costs of the appointment of the new trustees, which would have been the mere costs of an endorsement on a deed, and had he refused to do that, he should not have supported the plaintiff in instituting a suit, by giving him the costs thereby occasioned.

REG. *vs.* LEGGATT. 18 Q. B. 781.

Habeas Corpus by Husband to regain Custody of Wife—This was a rule calling on Mr. Leggatt, at the instance of Mr. Sandilands, to show cause why a *habeas corpus* should not issue to bring up the body of the applicant's wife, who was not on good terms with the applicant, and voluntarily resided with Mr. Leggatt, her son. On cause being shown, the Court of Queen's Bench discharged the rule, holding that where a wife is, by her own desire, living apart from her husband, and is under no restraint, the court will not grant a *habeas corpus* on the application of the husband, for the purpose of restoring her to his custody.—(See Re Cochrane, 8 Dowl. 630; and *Rex* vs. *Mead*, 1 Burr. 542.)

BARKER *vs.* THE MIDLAND RAILWAY COMPANY. 18 Com. B. 46.

Railway Company—Right of, to exclude Vehicles from their Station-yard—This was an action by the plaintiff, an omnibus proprietor, who carried passengers and their luggage for hire to and from a railway-station of the defendants, for a refusal by the defendant's servant to allow him to drive his vehicle into the station-yard. There were demurrers and cross-demurrers raised by the pleadings, and the court decided in favor of the defendants, on the ground that no duty was shown on the defendants' part to permit the plaintiff to come upon their land.

NEWARK PLANK ROAD *vs.* ELMER, 1 Stock. N. J. Chanc. Rep. 754.

Obstructions to navigation under authority of charter.—By the eighth section of the act incorporating the Newark Plank Road and Ferry Company, they are authorized to construct a plank road, to commence in the city of Newark, east of Broad street; and thence passing by the most convenient and direct course, to the bank of the Passaic river, near the old ferry, and across the meadow between the Passaic and Hackensack rivers, and through the county of Hudson in the most eligible route to its point of termination in said county and opposite the city of New York; and that it shall be lawful for the said company at any time to drive piles and erect or build piers, wharves, platforms, ferry stairs, or other works necessary for the said road and ferrys thereon in the said Passaic and Hackensack rivers; provided always that the free and uninterrupted navigation of vessels in said rivers or either of them, is not thereby prevented by any bridge or other obstruction in any manner whatever.

The eleventh section provides that the company shall keep and maintain two good and sufficient ferry boats at the respective ferries on each of the said rivers and shall cause lamps to be put up at the extreme point of each pier at said ferries which shall be lighted before dark every evening, and kept lighted until daylight next morning. After the company had driven piles and indicated the distance to which they intended to project piers into the river, a bill was filed praying an injunction restraining the said company from projecting piers, &c. into the Passaic river, and from obstructing the free navigation of said river.

Held, that the act gives the company the right to extend their works beyond the banks of the river; that the language of the proviso assumes that the works authorized will be an obstruction to the river, but provides that no such obstruction shall be built or erected as would prevent the free and uninterrupted navigation of vessels in the river.

As the plan of the company mentioned in the bill and answer, and upon which they were proceeding to construct their works in and over the river, extended into the river to the obstruction of navigation beyond what was necessary for the purposes of, and contemplated by the act of incorporation, an injunction was allowed, restraining the defendants from constructing their works upon that plan.

Held, That if the contemplated plan would occasion an obstruction to the navigation of the river beyond what the charter authorized, the works would be a nuisance.

Every erection in a navigable river which detracts or hinders the navigation, is a nuisance.

It is well settled that grants of this nature are to be construed strictly, and not extended beyond what is reasonably necessary for the purpose the act contemplates.

The issue made is that the piers were proposed to be built as the charter authorized, and would not prevent the free and uninterrupted navigation to any greater extent than was intended by it. The question is as to the meaning of the charter. It is too plain to admit of a reasonable doubt that, independent of the charter, they would constitute a nuisance.

KEAN *vs.* JOHNSON, 1 Stock. N. J. Ch. Rep., 401

Authority of a majority of the stockholders in a corporation to vary their business.—When a board of directors or a majority of stockholders deviate from the originally contemplated undertaking, the "rights" of other and dissenting stockholders are "affected," and as against them they cannot legally do it.

A majority of stockholders in a prosperous corporation cannot at their own mere caprice, sell out the whole source of their emoluments and invest their capital in other enterprises where the minority desire the prosecution of the business in which they had engaged. The contract is, that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes.

Where the duration of such employment is limited in the charter, until that time it must continue so employed, unless perhaps in case of clear loss. If no time is fixed by the charter, at which the proposed use of the capital shall cease, the contract is, that so long as the affairs of the company are prosperous it shall go on, unless all consent to the contrary.

How far, under what circumstances, and upon what application a court of equity would restrain a corporation from an improper alienation of its property, must depend upon the general principles which guide it in the exercise of its powers; but in a proper case made, it would interfere to prevent a disposition of its property for other than corporate purposes.

"It is the right of a partner to hold his associates to the specified purposes whilst the partnership continues."

In the enacting section of the charter of a railroad, the words "and they and their successors by the said name and style shall be capable of purchasing; holding, and conveying, any lands, tenements, goods and chattels whatever necessary and expedient to the objects of this incorporation, only authorize property to be sold and conveyed away, when it is necessary or expedient to the objects of the incorporation. The objects of the incorporation cannot require that the necessary source of its profitable existence should be sold and conveyed away.

A supplement to the act of incorporation of a railroad company authorizing the company to purchase the road constructed by another company, and declaring that the purchased road should become a part of the road authorized to be constructed by the charter, contained a proviso: That nothing in this act contained, shall in anywise affect any right whatever, either at law or in equity of any stockholder or other person in, or any claim or demand against the company whose road it was contemplated to purchase. Held, that the purchase authorized by the supplement did affect the rights of the stockholders in the company whose road was to be purchased. And that the legislature intended when they provided that nothing in that act contained should in anywise affect any right whatever, that such purchase should not occur without that which alone could prevent its affecting such rights, viz: the consent of every stockholder.

Quære. Whether a supplement authorizing any deviation from the original charter and not requiring the consent of all the stockholders is unconstitutional.

Where the company whose road was purchased under the above supplement and who were not a necessary party to any of the different kinds of relief prayed, had not been made a party to a bill filed by one who was a protesting stockholder, against the directors of both roads and the company in possession of the road, and all its property but the franchise; and the objection was not taken until the hearing of a general demurrer to the equity of the bill; the court disposed of the case on its merits without requiring such formal parties to be joined.

ATTORNEY GENERAL *vs.* PATTERSON, 1 Stock. N. J. Chanc. Rep. 624.

Injunction—irreparable mischief.—The object of a preliminary injunction is to prevent some threatening irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.

Where it does not appear that irreparable mischief is liable to ensue from leaving a party to go on exercising a right he claims, the court never stops him before it has an opportunity of examining the question of right. The mere erection of a house, intended as a poor and work-house, is in itself no injury to anybody; nor is the sending of paupers into a township or county illegally, or keeping them there a few months, a case of irreparable mischief.

Where at the time a preliminary injunction was applied for, the main question in the cause, which was essentially a question of law, was pending before a court of law, the application was refused. The rule has been long established that, in such cases, a court of equity does not interfere by injunction until the question of right is determined.

MORRIS AND ESSEX R. R. *vs.* BLAIR, 1 Stock. N. J. Chanc. Rep. 635.

Right to surveyed route by railroad company.—Two railroad companies were incorporated to complete two independent lines across the State. No route was prescribed to either other than the termini. There was no conflict of routes on the face of the charters, and no necessary conflict in carrying out the objects of the charters.

Held, that the prior right attached to the company which first actually surveyed and adopted a route and filed their survey in the office of the Secretary of State.

That as no specific route was granted to either company, a right to no particular place accrued to either until they had selected or determined upon a location. That no importance should be attached to the fact that the charter of one company was passed seven days before that of the other.

The mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

By adopting and filing a survey of their route, a company acquire a right to obtain the lands over which it passed; and they cannot be deprived of that right by another company purchasing and taking deeds for those lands, even if made without notice.

Such conveyances could at most put the purchasers in the condition of land owners, liable to have their lands taken upon making compensation.

DAVIDSON *vs.* ISHAN, 1 Stock. N. J. Chanc. Rep. 186.

Nuisance in the use of a Steam Engine.—There may be circumstances where even the noise of a steam engine may become a private nuisance, and its use on that account, be restrained by the court. But it would seem that the use of a steam engine is not prima facie a nuisance on account of its danger to life from explosion.

The machinery of a mill, which adjoined private dwellings in a densely populated part of a city, was driven by a steam engine. The complainants alleged that the lives of those residing in the neighborhood were exposed to the danger of the bursting of the boiler of the steam engine, that the working of the steam engine and machinery, shook the adjacent houses, and particularly two of the houses owned by one of the complainants, that the business there carried on caused smoke, steam, vapor, and unwholesome stenches of a nauseous and disgusting character, rendering it uncomfortable to dwell in the vicinity. The defendants denied that their business as carried on was a nuisance, and alleged that the facts upon which the complainants rely, had been submitted to the proper tribunal for trying issues of fact, and that the issue had been found in their favor.

Held, that the business being a lawful one, the question of nuisance is a matter of fact to be determined by the evidence; that upon conflicting testimony, this court would not interfere where the question of fact had been previously submitted to a court of law whose peculiar province it is to determine questions of law involved in the issue, and to guide and direct the jury to a proper result. That it is not necessary to constitute a nuisance, that the smell should be unwholesome, it is enough if it render the enjoyment of life and property uncomfortable.

THE MORRIS CANAL CO. *vs.* FISHER, 1 Stockton's N. J. Chanc. Rep. 667.

Title to Coupon Bonds by delivery.—Coupon bonds payable to bearer, although not negotiable under the law merchant as bills and notes, are instruments of a peculiar character, and being expressly designed to be passed from hand to hand, and by common usage actually so transferred are capable of passing by delivery so as to confer a complete title in the possessor. They are the subject of pledge.

CROUCH *vs.* THE GREAT NORTHERN RAILWAY, 25 L Jour. Rep. 137. Ext.

Carrier—Railway Company—Packed parcels—Enclosures—Misdirection—Damages for loss of custom.—A declaration by a carrier against a railway company for not carrying a parcel to Leeds in a reasonable time, and for not delivering it, laid, as damages, that the plaintiff was injured in his trade as a collector of parcels, and lost the custom of several persons. The plaintiff, a carrier in London, was in the habit of collecting in London small parcels from different persons to be sent to various persons in the country.

After collecting them, he used to make them into one parcel, called a "packed parcel," which he directed to his agent in the country, and brought to the defendants to be carried. The plaintiff was also in the habit of bringing to the defendants for carriage into the country, parcels containing other small parcels, belonging to one individual in London, and sent by him to one individual in the country. These parcels were called "enclosures."

The defendants charged the plaintiff at a higher rate for "packed parcels" than for "enclosures," and they also charged him at a higher rate than the rest of the public. The learned judge stated to the jury that an action of trover against the defendants could not be brought by each of the owners of the packages contained in the "packed parcels" in the event of loss or mis-delivery, although an action might lie by each owner for the destruction of the packages by the defendants, independently and beyond their duty as carriers. He also left it to the jury to say whether there was a difference as regarded the risk between carrying "packed parcels" and "enclosures." The jury found that there was no substantial difference as regarded the risk of carrying the two kinds of parcels; and they found a verdict for the plaintiff, damages £200, on the ground that the plaintiff had sustained injury in his trade and loss of custom to that extent, in consequence of the defendants' acts: *Held,* that the judge rightly directed

the jury, the question of risk as regarded the two kinds of parcels being a question of fact and not of law. *Held*, also, that as the declaration was framed, the plaintiff was not entitled to recover the £200 as damages for the injury to his trade and loss of custom.

Semble, per Martin B., that if the fact had been that the plaintiff was a carrier whose business consisted in collecting goods to be forwarded by the defendants' railway, and that the defendants designedly refused to carry his parcels, which they were bound by law to carry, in order to obtain a monopoly and to destroy the plaintiff's business, under such circumstances a jury would be justified in giving very heavy damages.

NOTICES OF NEW BOOKS.

TREATISE ON THE NATURE, PRINCIPLES AND RULES OF CIRCUMSTANTIAL EVIDENCE; especially that of the presumptive kind in Criminal Cases. By Alexander M. Burrill, Counsellor-at-Law; author of the new Law Dictionary, Law of Voluntary Assignments, &c. &c. New York: John S. Voorhies, 20 Nassau street. 1856. pp. 796.

This is an elaborate volume on that interesting branch of law known to the profession and generally to educated laymen by the name of circumstantial evidence. Few great criminal trials are ever conducted without a large use of this branch of law, and a complete and comprehensive treatise containing all the cases was much needed.

The whole subject, the author tells us in his preface, is comprised in two parts. In the first of these, which is introductory to the other, after some elementary explanations of the nature of evidence, a considerable space is devoted to the illustration of the principle of presumption as founded in nature, and the manner in which it is applied to the development of truth in matters of science as well as in ordinary life. This is followed by a general view of the nature and operation of circumstantial evidence, as an instrument of judicial investigation in criminal cases; presenting, first, the object of inquiry or fact sought; next the facts which are to constitute a basis for the inferences by which it is to be reached; next, the process of inference itself; and finally, the conclusion arrived at or verdict given.

In the second part, the subject is considered exclusively in a judicial point of view, and is treated in detail, with as much minuteness as the limits of the work would allow. The order adopted is the natural one; present-